

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

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In Re: MATTHEW MARK HIGGINS,  
AMY BETH HIGGINS,

Bankruptcy Case No.: **03-36033 DDO**  
Chapter 7

Debtors.

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CHARLES W. RIES, TRUSTEE,

Plaintiff,

v.

Adversary Case No.: **04-3247 DDO**

ROCHESTER MOTOR COMPANY,  
dba ROCHESTER FORD, and  
AFFINITY PLUS FEDERAL CREDIT UNION,

Defendant.

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**DEFENDANT AFFINITY PLUS FEDERAL CREDIT UNION'S REPLY TO  
PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT AFFINITY PLUS  
FEDERAL CREDIT UNION'S MOTION FOR SUMMARY JUDGMENT AND  
RESPONSE TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT**

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TO: THE ABOVE-NAMED COURT AND CHARLES W. RIES, TRUSTEE AND PLAINTIFF,  
THROUGH HIS ATTORNEY, CHARLES W. RIES, ESQ., UNION SQUARE BUSINESS  
CENTER, SUITE 200, 201 NORTH BROAD STREET, POST OFFICE BOX 7, MANKATO,  
MINNESOTA 56002-0007, PURSUANT TO RULE 7004(b)(9).

**INTRODUCTION**

Defendant Affinity Plus Federal Credit Union submits this Reply to Plaintiff's Memorandum in Opposition to Defendant Affinity Plus Federal Credit Union's Motion for Summary Judgment and Response to Plaintiff's Cross-Motion for Summary Judgment.

**DEFENDANT AFFINITY PLUS FEDERAL CREDIT UNION'S REPLY TO  
PLAINTIFF'S MEMORANDUM IN OPPOSITION**

**1. PLAINTIFF CANNOT ESTABLISH DIMINUTION TO THE ESTATE**

The facts are plain and simple. The Debtor's estate remains unchanged. Prior to bankruptcy, the Debtors were upside-down on his car loan 123 percent loan-to-value. After the exchange, the Debtor still owned a car (newer) and still had a loan-to-value ratio of 127 percent. Additionally, the Debtor received a benefit in that a non-filing co-signor was removed from the loan.

**2. PLAINTIFF CANNOT ESTABLISH THAT A \$4,000.00 TRANSFER OCCURRED**

Defendant Affinity Plus Federal Credit Union argues that Plaintiff has not yet proven that the alleged transfer of \$4,000.00 actually occurred. Plaintiff has produced no evidence that Debtor's paid \$4,000.00 to either Defendant. Further, Plaintiff has provided no evidence that the alleged \$4,000.00 was, in fact, money that belonged to the Debtors. Since the trade happened so close to the date that the Debtors filed their bankruptcy, it is quite plausible that the alleged \$4,000.00 may have actually belonged to Debtor Matthew Higgins' father, Randy Higgins, the non-filing co-signor on the note for the 2001 Mazda, who indeed benefited along with the Debtors by the trade. In his response to Defendant Affinity Plus Federal Credit Union's discovery requests, Plaintiff provided no documents, whatsoever, to prove that Debtors made the alleged payment of \$4,000.00, or where the alleged monies were derived (i.e. Debtors' bank statements, copy of the tendered check, etc.).

**3. PLAINTIFF CANNOT ESTABLISH DEBTORS INSOLVENCY OR 11 U.S.C. 547(b)**

With respect to 11 U.S.C. 547(b)(2), Plaintiff argues that, pursuant to 11 U.S.C. 547(f), the Debtors are presumed insolvent on and during the 90 days before the filing of the bankruptcy.

Although, this may be true, pursuant to 11 U.S.C. 547(g), "the Trustee has the burden of **proving** the avoidability of a transfer under subsection (b)..." (emphasis added). Plaintiff has not provided any documents or information to establish the Debtors' insolvency and apparently has conducted no investigation related thereto. Further, in his responses to Defendant Affinity Plus Federal Credit Union's discovery requests, Plaintiff has provided virtually no documents or information to establish his claim as to the other three factors either as is his burden under 11 U.S.C. 547(b).

**4. PLAINTIFF'S DISCOVERY RESPONSES FAILED TO DISCLOSE INFORMATION TO DEFENDANT AFFINITY PLUS CREDIT UNION THAT PLAINTIFF NOW PRESENTS TO THE COURT IN REBUT OF SAID DEFENDANT'S DEFENSE**

Defendant Affinity Plus Federal Credit Union further notes that it propounded its Admissions, Interrogatories, and Document Requests to Plaintiff in good faith and Plaintiff's responses to the discovery requests were wholly incomplete, evasive, non-responsive, and in some cases, inappropriate (*i.e.* answers to interrogatory numbers 3, and 4). Defendant Affinity Plus Federal Credit Union communicated to Plaintiff by letter, dated July 28, 2004, regarding the incomplete and non-responsive nature of his responses to discovery. On July 29, 2004, Plaintiff's counsel transmitted a combative letter to Defendant Affinity Plus Federal Credit Union's counsel stating her opinions regarding our discovery requests, but to date has provided no amended response to the original discovery requests.

Plaintiff responded to Defendant Affinity Plus Federal Credit Union's Admissions, numbered 6 through 10, specifically regarding the earmarking doctrine and its elements, by stating that he either "lacked information" or had "insufficient information from which to form a belief or an opinion". However, Plaintiff now comes before the Court with a formal memorandum and dissertation in opposition to the application of the earmark defense in this matter, in direct violation of the Federal Rules of Civil Procedure, Rule 37.

## **RESPONSE TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT**

### **1. PLAINTIFF CANNOT ESTABLISH THAT THE \$4,000.00 TRANSFER OCCURRED OR THAT DEBTORS CONTROLLED THE FUNDS RECEIVED BY DEFENDANT AFFINITY PLUS FEDERAL CREDIT UNION**

Plaintiff has failed to prove the "crux" of his claim. Moreover, Plaintiff incorrectly claims that "it is undisputed that the Debtors paid \$4,000.00..." of the \$16,669.00 payment that Defendant Affinity Plus Federal Credit Union received from Rochester Ford-Toyota. Defendant Affinity Plus Federal Credit Union argues that Plaintiff has failed to provide any evidence to prove that the alleged payment of \$4,000.00 was actually made by the Debtors. Furthermore, and more importantly to Defendant Affinity Plus Federal Credit Union's 'earmarking doctrine' defense, in the event that Debtors *did* make an alleged \$4,000.00 payment to Rochester Ford-Toyota, Plaintiff has failed to prove that the Debtors exercised control over the payment to Defendant Affinity Plus Federal Credit Union that could be construed as "dispositive control" sufficient in which to determine that the alleged funds that Defendant Affinity Plus Federal Credit Union received were actually the Debtors property.

### **2. PLAINTIFF CANNOT ESTABLISH DIMINUTION TO THE ESTATE OR REBUT THE VALIDITY OF THE APPLICATION OF THE EARMARK DEFENSE IN THIS CASE**

In his Motion, Plaintiff alleges that the purchase agreement for the 2003 Ford Escort shows a **negative down payment** [from Debtors to Rochester Ford]. Therefore, the loan of \$16,669.00 made to Debtors by Rochester Ford-Toyota, solely to enable the Debtors to pay off the obligation owed to Affinity Plus Federal Credit Union was made with new funds belonging to Rochester Ford-Toyota, completely outside of control of the Debtors. Rochester Ford-Toyota provided the funds, and at all times controlled the funds, received by Defendant Affinity Plus Federal Credit Union in satisfaction of said obligation. As a result of the foregoing, Plaintiff

cannot meet his burden to prove that the transfer of \$16,669.00 to Defendant Affinity Plus Federal Credit Union was a 'transfer of an interest of the debtor in property.'..., a statutory requirement of a voidable preference.

### **3. CALCULATION OF RETAIL MARKET VALUE VS. TRADE-IN VALUE IS APPROPRIATE**

Plaintiff continues to incorrectly use the trade-in value of the 2001 Mazda in the sum of \$7,250.00 in his calculations and insinuates that Defendant Affinity Plus Federal Credit Union believes that Rochester Ford "took advantage of the Debtors" to the extent of \$2,250.00 in the transaction. Defendant Affinity Plus Federal Credit Union makes no claim of this sort. The concepts of both 'trade-in value' (TMV) and 'retail market value' (RMV) are widely recognized to denote values that consumers can reasonably expect based on the circumstance of their transaction and the market at the time of their transaction. Rochester Ford allowed \$7,250.00 in trade on the 2001 Mazda in its agreement with the Debtors and will likely sell the 2001 Mazda at or about retail market value. Similarly, Defendant Affinity Plus Federal Credit Union argues that it would have been entitled to file a secured claim of the retail market value in the sum of at least \$9,500.00, if it were a creditor in the Debtors bankruptcy. In reality, the retail market value of the vehicle likely depreciated at a rate of approximately 1.5 percent, a common calculation of monthly depreciation, each month between the months of August 2003 (the time of the trade) and March 2004, at which time Defendant Affinity Plus Federal Credit Union obtained the current retail market value of \$9,500.00 from NADA's appraisal guides in its initial research of this matter. Taking this into consideration, the actual retail market was probably closer to \$10,500.00 at the time of the trade.

#### **4. TRANSFER TO DEFENDANT AFFINITY PLUS FEDERAL CREDIT UNION BY ROCHESTER FORD-TOYOTA WAS MADE FOR THE BENEFIT OF THE DEBTORS**

Plaintiff incorrectly argues that the \$16,669.00 payment made by Rochester Ford-Toyota to Defendant Affinity Plus Federal Credit Union was made for the benefit of Defendant Affinity Plus Federal Credit Union. In fact, said payment was made by Rochester Ford-Toyota (the new creditor) to Affinity Plus Federal Credit Union (the old creditor) pursuant to and in performance of the terms of the contract between Rochester Ford-Toyota and Matthew Mark and Amy Beth Higgins (the Debtors) for the benefit of the Debtors.

In his Motion, Plaintiff admits that "Rochester Ford sold a vehicle to Debtors...then satisfied the obligation owed to Affinity...". However, Plaintiff goes on to incorrectly state that the satisfaction was obtained "by crediting the Debtors \$7,250 for the trade-in of the Mazda and \$4,000 received from the Debtors and then paid the balance owed on the Escort debt." In fact, the satisfaction was obtained by Rochester Ford-Toyota's tendering of the balance owed in the sum of \$16,669.00 to Affinity Plus Federal Credit Union on behalf of Debtor Matthew Mark Higgins and Randy Higgins, non-filing co-signor on their obligation to Affinity.

#### **5. FACTS OF THE PRESENT CASE MEET CRITERIA TO APPLY EARMARKING DEFENSE**

The facts of the present case meet the specific criteria set forth in *In re Bohlen Enterprises, Ltd.*, 859 F.2d 561, 565, 18 Bankr. Ct. Dec. (CRR) 672, 19 Collier Bankr. Cas. 2d (MB) 986 (8<sup>th</sup> Cir.1988), to allow Defendant Affinity Plus Federal Credit Union to apply the earmarking defense in this matter: Debtor Matthew Mark Higgins held an interest in the 2001 Mazda secured by a note held by Defendant Affinity Plus Federal Credit Union (old creditor) which was transferred/released to Rochester Ford (new creditor/lender) upon its payoff of the debt owed by Matthew Mark Higgins and Randy A. Higgins to Affinity Plus Federal Credit Union in execution

of the terms of the new contract agreement between Rochester Ford and the Debtors, Matthew and Amy Higgins, for the financing and purchase of the 2003 Ford Escort ZX2. The new funds, in the form of a check from Rochester Ford-Toyota, dated August 5, 2003, payable to Affinity Plus Credit Union in the sum of \$16,669.00, were advanced by the new creditor, Rochester Ford, for the benefit of the Debtors and for the strict purpose of paying the pre-existing obligation owed to the old creditor. The Debtors exercised no control over the disposition of the "earmarked" funds from Rochester Ford-Toyota to Affinity Plus Federal Credit Union.

**6. PLAINTIFF CANNOT ESTABLISH CHANGE TO DEBT-TO-ASSET RATIO OR DIMINUTION TO THE ESTATE**

According to the Plaintiff, at the time of the transaction, the Debtors had a \$4,000.00 cash asset. Additionally, the retail market value of the 2001 Mazda was at least \$9,500.00<sup>1</sup>, and \$16,669.00 remained owing on the note held by Defendant Affinity Plus Federal Credit Union. At the time of the bankruptcy filing, Debtors claim that the retail market value of the 2003 Ford Escort ZX2 was \$15,000.00; according to the contract between Debtors and Rochester Ford a debt remained owing on the 2003 Ford Escort of \$19,061.37. Taking into consideration only those assets and debts related to this action, the Debtor's pre-trade debt to asset ratio is \$16,669.00 (debt) to \$13,500.00 (value), or 80 percent; the Debtors post-trade debt to asset ratio is \$19,061.37 (debt) to \$15,000.00 (value), or 79 percent. Said ratios are virtually identical. In their transaction with Rochester Ford, Debtors exchanged "like-for-like" debt and "like-for-like" assets; hence the trade did not impact their prior debt-to-asset ratio or otherwise result in any diminution of the Debtors' estate. Furthermore, the structure of duties and rights, debts and assets, did not change due to the transaction, and both Rochester Ford-Toyota, the new creditor,

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<sup>1</sup> Plaintiff incorrectly used the trade-in value in his Complaint, rather than the actual *retail market value*.

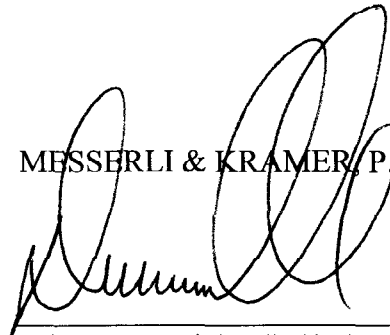
and Affinity Plus Federal Credit Union, the old creditor, would have enjoyed the same priority status within the Bankruptcy Code.

### **CONCLUSION**

Defendant Affinity Plus Federal Credit Union reiterates its request that summary judgment be granted in its favor and against Plaintiff. Defendant Affinity Plus Federal Credit Union has established that the Plaintiff has not met his burden to prove that the alleged \$4,000.00 transfer from Debtors to Defendants occurred, and cannot meet his burden to prove each of the five factors as is required by 11 U.S.C. §547(b) as relates to Defendant Affinity Plus Federal Credit Union. Further, Defendant Affinity Plus Federal Credit Union has established that the "earmarking doctrine" is applicable in this case, as it applies to the circumstances relating to Defendant Affinity Plus Federal Credit Union.

Dated: September 16, 2004.

MESSERLI & KRAMER, P.A.

A handwritten signature in black ink, appearing to be 'William C. Hicks', is written over a horizontal line.

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